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CONCORD, N.H.

Mr. Adelard E. Cote, Commissioner
Department of Labor
State House
Concord, New Hampshire

Dear Mr. Cote:

This is in reply to your letter of May 6, 1958, in which you request our opinion relative to an interpretation of RSA 281:31.

You state that in a case now pending before you there was a dispute as to whether the injured employee sustained his injuries in and about the course of his employment. The Workmen's Compensation carrier denied liability on that ground and a hearing was finally held before you after which you ruled in favor of the employee. However, some time had elapsed between the date of injury and the date of your award and during that time the employer had continued to pay the employee his full wages even though he was unable to work. The insurance carrier now claims that it is entitled to credit the wages paid by the employer during the period of disability against the award of compensation and your question is whether the insurance company's contention is correct.

RSA 281:31 provides in part as follows:

"Payments made by an employer, or his insurer, to an injured employee during the period of his disability, or to his dependents, which by the provisions of this chapter were not due and payable when made, may, subject to the approval of the commissioner of labor, be deducted from the amount to be paid as compensation; . . ."

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Apart from section 31 there is absolutely nothing to prevent an employer from paying an injured employee his full wages or any part thereof, or for that matter, any sum he wishes during the period of disability. We see nothing in section 31 which changes that rule. Accordingly, if the payments made by the employer to the employee in this case represented a gratuity and were not intended as compensation or a substitute for compensation the insurance company is not entitled to the credit they claim under any circumstances. Hartford Accident and Indemnity Co. v. Hay, 159 Conn. 202.

In our opinion, RSA 281:31 applies only to payments by the employer or his insurer which were intended as compensation or as a substitute for compensation and which were made at a time when no payment of compensation was due and payable under the provisions of RSA 281. Whether or not such is the case will depend largely upon the intent of the employer or his insurer in making the payments, and, of course, that involves a determination of a question of fact. If you find that the payments made were so intended then it is within your discretion to credit them against the award of compensation. The statute provides no guide for you in the exercise of this discretion, so presumably, in determining whether or not to allow such payments as a credit against the award of compensation you are to be guided by the general rule of what is fair and equitable as between the parties concerned. Should you determine that a credit should be allowed it should not exceed the amount of compensation to which the employee is entitled on a week to week basis. That is, any excess of payments actually made over compensation due in any given week should not be carried forward as a credit against compensation due for the following week or weeks.

You also inquire as to whether in the event the insurance company is required to make payment to the employee the said employee would be required to reimburse the employer to the extent of compensation received. In the first place if the payments made by the employer were in the nature of a gratuity our answer, of course, is in the negative. On the other hand if you find that a credit should be allowed, as outlined above, because the payments were intended as compensation rather than as a gratuity it is our belief that the insurance company must still make the payments required by the terms of its policy but that such payments to the extent of the credit which you determine should be allowed should be made either directly to the employer or means should be adopted to see that the employee reimburses his employer to the extent of such credit. In any event such credit cannot operate to the benefit of the insurance carrier itself except in the instance where it was the one

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which made payments to the employee during the period of disability.

Sincerely yours,

John J. Zimmerman
Assistant Attorney General

JJZ/lt

sent to Council of State Government